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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL  
DIVERSITY,

Plaintiff,

v.

DIRK KEMTHORNE et al.,

Defendants.

) 1:08-cv-1490 AWI GSA

) SCHEDULING ORDER (Fed. R. Civ. P. 16)

) Administrative Record due : 4/1/09

) Motion To Supplement Administrative  
) Record : 4/22/09

) Opposition To Motion to Supplement  
) Administrative Record : 5/6/09

) Reply for Motion to Supplement  
) Administrative Record : 5/13/09

) Status Conference : May 26, 2009  
) Time : 9:30 am  
) Location: Courtroom 10

**I. Date of Scheduling Conference**

January 6, 2009

**II. Appearances of Counsel**

Justin Augustine appeared telephonically on behalf of Center for Biological

1 Diversity. ("Plaintiff").

2 Clifford Stevens appeared telephonically on behalf of Defendant Dirk Kempthorne and  
3 U.S. Fish and Wildlife Service ("Defendants").

4 **III. The Pleadings**

5 *A. Plaintiff's Contentions :*

6 The Center for Biological Diversity ("the Center") is seeking declaratory and  
7 injunctive relief in connection with Defendants' alleged violations of the Endangered  
8 Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"). Plaintiff alleges that the Secretary of the  
9 Interior ("Secretary") and the United States Fish and Wildlife Service ("Service")  
10 (collectively "Defendants") have violated the ESA by failing to designate adequate  
11 critical habitat for the endangered Buena Vista Lake shrew, in order to ensure the  
12 conservation and recovery of the species. 16 U.S.C. § 1533(a)(3). Endangered and  
13 Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Buena  
14 Vista Lake Shrew, 69 Fed. Reg. 51417 (August 19, 2004); Endangered and Threatened  
15 Wildlife and Plants; Final Rule to Designate Critical Habitat for the Buena Vista Lake  
16 Shrew (*Sorex ornatus relictus*), 70 Fed. Reg. 3439 (January 24, 2005). Plaintiff alleges  
17 that Defendants' failure to issue a legally sufficient critical habitat designation for the  
18 Buena Vista Lake shrew violates Section 3 and Section 4 of the ESA. 16 U.S.C. §§  
19 1532(5)(A) and 1533(a)(3)(A). Plaintiff specifically alleges that Defendants' violations  
20 include, but are not limited to: failing to designate sufficient critical habitat to conserve  
21 the species; improperly relying on an invalid regulation; failing to quantify and analyze  
22 the economic and other benefits of designating critical habitat for the Buena Vista Lake  
23 shrew; improperly attributing costs associated with listing the species and other costs to  
24 the designation of critical habitat; improperly including speculative costs; and failing to  
25 consider the likelihood of the extinction of the Buena Vista Lake shrew. 16 U.S.C. §  
26 1533(b)(2).

1 *Defendants Contentions :*

2 In their Answer, which will be filed on January 7, 2008, Defendants expect to  
3 maintain in this case that the Service's critical habitat designation was reasonable and  
4 complies with the ESA and the Administrative Procedures Act ("APA"), 5 U.S.C. §551 et  
5 seq.

6 The parties do not anticipate amendments to the pleadings at this time. Any  
7 amendments to the pleadings shall be filed no later than **February 28, 2009**.

8 **IV. Factual Summary**

9 *A. Uncontested and Contested Facts:*

10 This case will be decided on the basis of an administrative record. Plaintiff  
11 reserves the right to advance the use of extra-record evidence. Defendants reserve the  
12 right to object to the use of extra-record evidence.

13 **V. Summary of Undisputed and Disputed Legal Issues:**

14 The Plaintiff maintains that the court has subject matter jurisdiction over its  
15 claims pursuant to the citizen suit provisions of the Endangered Species Act ("ESA") (16  
16 U.S.C. §§ 1540(c) and (g)) and the general federal question statute (28 U.S.C. § 1331).  
17 Plaintiff also maintains that venue is proper in this district because the species occurs  
18 here, and that the applicable laws are the ESA and the APA. Defendants have not yet  
19 filed their answer and reserve the right to challenge jurisdiction and venue.

20 The legal issues in dispute concern the Defendants' compliance with the ESA including,  
21 but not limited to: inclusion of certain costs in the balancing of economic considerations  
22 for a critical habitat exclusion under the statute; whether certain areas were properly  
23 excluded where Plaintiff alleges that they require special management; and whether  
24 Defendants designated sufficient critical habitat to conserve the species.

25 **VI. Consent to the Magistrate Judge**

26 Pursuant to 28 U.S.C. § 636(c), the parties have not consented in writing to  
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1 conduct all further proceedings in this case, including trial, before the Honorable Gary S.  
2 Austin, U.S. Magistrate Judge.

3 **VII. Discovery Plan and Cut-Off Date**

4 This case is an action for review on an administrative record. Accordingly, it is  
5 exempt from initial disclosures under Federal Rule of Civil Procedure 26(a)(1). Fed. R.  
6 Civ. P. 26(a)(1)(E)(i). There has been no discovery to date and the parties do not  
7 anticipate that there will be any discovery in this case. Plaintiff, however, reserves the  
8 right to conduct discovery pursuant to any applicable exceptions allowing the use of  
9 extra-record evidence. Defendants reserve the right to object to any discovery, on the  
10 basis that the review is limited to the record, and therefore the discovery is barred, or on  
11 other grounds.

12 **VIII. Motion Deadlines and Trial Issues**

13 This case is likely to be disposed of by dispositive Cross-Motions for Summary  
14 Judgment. Therefore, no pre-trial conference or trial date will be set as this time. In the  
15 event that the case proceeds to trial, it is anticipated that any trial will be a court trial.

16 The parties have agreed to the following initial schedule for this case:

17 **April 1, 2009** - Administrative Record Filed.

18 **April 22, 2009** - Any Motions to Supplement Administrative Record.

19 **May 6, 2009** - Oppositions to Motions to Supplement Administrative Record.

20 **May 13, 2009** - Replies for Motions to Complete or Supplement Administrative  
21 Record.

22 A status conference will be held on **May 26, 2008 at 9:30** in Courtroom 10 at  
23 which time a briefing schedule for Motions for Summary Judgment will be set. If no  
24 Motions to Supplement the Administrative Record will be filed and the parties wish to  
25 advance the status conference, the parties may notify the court. One week prior to the  
26 status conference, the parties shall submit a joint proposed briefing schedule to expedite  
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1 the setting of dates.

2 **IX. Settlement Conference**

3 A settlement conference has not been scheduled as the parties are currently  
4 exploring settlement. However, in the event that a settlement conference is set in  
5 the future, unless otherwise permitted in advance by the Court, the attorneys who  
6 will try the case shall appear at the Settlement Conference with the parties and the  
7 person or persons having full authority to negotiate and settle the case on any terms<sup>1</sup>  
8 at the conference.

9 The Court has indicated that in-house counsel for Defendant need not appear  
10 in person at the Settlement Conference, but shall be available by telephone for  
11 purposes of the Settlement Conference.

12 **CONFIDENTIAL SETTLEMENT CONFERENCE STATEMENT**

13 At least five (5) court days prior to the Settlement Conference the parties  
14 shall submit, directly to the Magistrate Judge's chambers by email to  
15 gsaorders@caed.uscourts.gov, a Confidential Settlement Conference Statement.  
16 The statement should not be filed with the Clerk of the Court nor served on any  
17 other party, although the parties may file a Notice of Lodging of Settlement  
18 Conference Statement. Each statement shall be clearly marked "confidential" with  
19 the date and time of the Settlement Conference indicated prominently thereon. The  
20 parties are urged to request the return of their statements if settlement is not  
21 achieved and if such a request is not made the Court will dispose of the statement.  
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23 <sup>1</sup> Insurance carriers, business organizations, and governmental bodies or agencies whose  
24 settlement agreements are subject to approval by legislative bodies, executive committees, boards  
25 of directors or the like shall be represented by a person or persons who occupy high executive  
26 positions in the party organization and who will be directly involved in the process of approval of  
27 any settlement offers or agreements. To the extent possible, the representative shall have the  
28 authority, if he or she deems it appropriate, to settle the action on terms consistent with the  
opposing party's most recent demand.

1 The Confidential Settlement Conference Statement shall include the following:

- 2 A. A brief statement of the facts of the case.
- 3 B. A brief statement of the claims and defenses, i.e., statutory or other  
4 grounds upon which the claims are founded; a forthright evaluation of the  
5 parties' likelihood of prevailing on the claims and defenses; and a  
6 description of the major issues in dispute.
- 7 C. A summary of the proceedings to date.
- 8 D. An estimate of the cost and time to be expended for further discovery,  
9 pretrial and trial.
- 10 E. The relief sought.
- 11 F. The party's position on settlement, including present demands and offers  
12 and a history of past settlement discussions, offers and demands.

13 Should the parties desire an additional settlement conference, they will jointly  
14 request one of the court, and one will be arranged. In making such request, the parties are  
15 directed to notify the court as to whether or not they desire the undersigned to conduct the  
16 settlement conference or to arrange for one before another judicial officer.

17 **X. Request for Bifurcation, Appointment of Special Master, or other Techniques**  
18 **to Shorten Trial**

19 The parties have not requested bifurcation.

20 **XI. Related Matters Pending**

21 The parties have not identified any related matters.

22 **XII. Compliance with Federal Procedure**

23 The parties are expected to familiarize themselves with the Federal Rules of Civil  
24 Procedure and the Local Rules of Practice of the Eastern District of California, and to keep  
25 abreast of any amendments thereto. The Court must insist upon compliance with these  
26 Rules if it is to efficiently handle its increasing case load and sanctions will be imposed for  
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1 failure to follow the Rules as provided in both the Federal Rules of Civil Procedure and the  
2 Local Rules of Practice for the Eastern District of California.

3 **XIII. Effect of this Order**

4 The foregoing order represents the best estimate of the Court and the parties as to  
5 the agenda most suitable to dispose of this case. The trial date reserved is specifically  
6 reserved for this case. If the parties determine at any time that the schedule outlined in this  
7 order cannot be met, counsel are ordered to notify the Court immediately of that fact so that  
8 adjustments may be made, either by stipulation or by subsequent status conference.  
9 Stipulations extending the deadlines contained herein will not be considered unless they are  
10 accompanied by affidavits or declarations, and where appropriate attached exhibits, which  
11 establish good cause for granting the relief requested. Failure to comply with this order  
12 may result in the imposition of sanctions.

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15 **IT IS SO ORDERED.**

16 **Dated: January 7, 2009**

**/s/ Gary S. Austin**  
**UNITED STATES MAGISTRATE JUDGE**